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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Appellant, v. JEFFRIE ANDREW KELLEY, Defendant and Respondent.	B170236 (Los Angeles County Super. Ct. No. PA044293)

APPEAL from an order of the Superior Court of Los Angeles County. Harvey Giss, Judge. Reversed.

Steve Cooley, District Attorney, George M. Palmer, Phyllis Asayama, and Victor M. Minjares, Deputy District Attorneys, for Plaintiff and Appellant.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Respondent.

The People appeal from an order dismissing the complaint charging cocaine possession against Jeffrie Andrew Kelley, after he successfully moved to suppress illegally obtained evidence. (Pen. Code, §§ 1238, subd. (a)(7); 1385; 1538.5.) We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

At the suppression hearing, Los Angeles Police Detective John Ray testified that he and his partner were conducting surveillance at a bar for reported narcotics activity. An undercover detective inside the bar alerted Ray that Kelley had briefly entered and left the bar in his pickup truck.

In their unmarked police car, Ray and his partner followed the pickup truck into a gas station. Kelley left his car and approached the station's store. He walked by the officers and Ray emerged from the car. Ray said to Kelley, "Excuse me." Kelley turned and Ray continued, "We're police officers. We're conducting a narcotics investigation. Can we talk to you for a minute?" Kelley answered, "Yeah. No problem."

Ray and Kelley walked to the front of the police car. Ray repeated that they were conducting a narcotics investigation. By now, Ray's partner had stepped out of the police car. Ray asked whether Kelley had any drugs or weapons on his person or in the pickup truck. Kelley said: "No." Ray asked, "Do you mind if I check?" Kelley responded: "Sure. Go ahead." Ray searched Kelley's pockets and found some keys. Ray retrieved the keys and began searching the passenger compartment of Kelley's pickup truck. The search of the truck was interrupted by Ray's partner, who found cocaine in Kelley's possession and motioned for Ray to join him. Kelley was placed under arrest.

Ray's testimony was corroborated by his partner, Detective Dennis McNeal, who further testified that he spoke to Kelley while Ray searched the pickup truck. McNeal asked whether Kelley had a driver's license or identification. Kelley answered, "Yes," and produced his wallet. McNeal asked whether he could retrieve Kelley's identification and search the wallet for narcotics. Kelley said, "Go ahead," handing McNeal the wallet. McNeal opened the wallet, removed Kelley's driver's license, and looked through the wallet. McNeal found a small paper bindle containing cocaine between two credit cards. He alerted Ray and placed Kelley under arrest.

Defense Evidence

Kelley testified that he left the bar and drove his pickup truck to a gas station. He alighted from the car. Two officers approached and said they were conducting a narcotics investigation. They asked to search him and Kelley consented. He did not feel free to refuse or to leave. Kelley saw the officers' weapons and he was afraid. After obtaining Kelley's consent, one officer began searching the pickup truck. The other officer asked Kelley for his driver's license. Kelley began to remove his driver's license from his wallet when the officer asked for permission to search the wallet. Kelley did not feel he had the right to deny the officer's request. He agreed by reason of the officer's "authority."

On cross-examination, Kelley conceded the officers did not draw their guns, nor did they yell or raise their voices. Neither officer put his hands on Kelley before Ray searched him. Kelley acknowledged the officers asked his consent prior to each search, and each time he gave verbal consent.

At the conclusion of the hearing, Kelley moved to suppress the cocaine seized on grounds his Fourth Amendment rights were violated. According to Kelly, he was unlawfully detained and his consent to search the wallet was involuntary. The court, acting in the limited role of magistrate, found the officers' testimony to be credible. The court concluded the officers acted unreasonably and granted the suppression motion. Specifically, the magistrate determined "that when [the officers] asked [Kelley] for his I.D., they went one step past what they had a right to do, and it became a full blown search and seizure with a defendant who had really every reason to believe that he wasn't free to go or to tell the police what to do." After the ruling, the People announced they were unable to proceed and the case was dismissed. This appeal followed.

DISCUSSION

The People argue the cocaine was lawfully seized because: (1) given the uncontested facts, a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter; (2) Kelley's subjective state of mind was improperly considered by the magistrate; and (3) contrary to the magistrate's reasoning,

Kelley could not create a coercive police atmosphere through his own freely given consent. Kelley disputes the People's contentions and maintains the suppression motion was properly granted because his consent to search the wallet was involuntary.

The Standard of Review

In reviewing the trial court's ruling on a motion to suppress, we defer to its factual findings, express or implied, if supported by substantial evidence. (*People v. Ayala* (2000) 23 Cal.4th 225, 255; *People v. James* (1977) 19 Cal.3d 99, 107.) The power to judge credibility, weigh evidence and draw factual inferences is vested in the trial court. (*People v. James, supra,* 19 Cal.3d at p. 107.) We exercise our independent judgment to determine whether, on the facts found, the search or seizure was reasonable under the Fourth Amendment. (*People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Leyba* (1981) 29 Cal.3d 591, 597.)

There Was No Fourth Amendment Violation

The trial court's ruling stemmed from its concern that Kelley's only recourse under the circumstances was to submit to the officers' inherent authority. As a result, the court concluded that McNeal's request for identification converted the otherwise consensual encounter into an unlawful detention because Kelley did not feel free either to leave or to refuse to consent to the search of his wallet. We disagree.

The Fourth Amendment "is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' [Citations.]" (*INS v. Delgado,* (1984) 466 U.S. 210, 215 [104 S.Ct. 1758, 80 L.Ed.2d 247]; see *People v. Souza* (1994) 9 Cal.4th 224, 229.) Contacts between citizens and police are of three types, two of which are a "seizure" triggering Fourth Amendment protections. A detention is the less intrusive of the two types of seizure, an arrest is the other. Contacts which are not a seizure are deemed to be consensual encounters and require no justification for their occurrence. (*In re Manuel G.* (1997) 16 Cal.4th 805, 821; *Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784.)

The notion has long been dispelled that an officer's request for identification, by itself, amounts to a detention in the sense that no reasonable citizen would feel free to

refuse. Police do not effect a detention "merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. [Citations.] Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage – provided they do not induce cooperation by coercive means." (*U.S. v. Drayton,* (2002) 536 U.S. 194, 200 [122 S.Ct. 2105, 153 L.Ed.2d 242]; *People v. Lopez* (1989) 212 Cal.App.3d 289, 291.) The fact that most people respond to a police request without being told they are free not to respond does not eliminate the consensual nature of the response. (*INS v. Delgado, supra*, 466 U.S. 210, 216.)

Instead the inquiry is whether in asking for identification, the officer, by means of physical force or show of authority, restrains the individual's liberty such that a seizure occurs. (*In re Manuel G., supra,* 16 Cal.4th at p. 821; *Florida v. Bostick* (1991) 501 U.S. 429, 434 [111 S.Ct. 2382, 2386, 115 L.Ed.2d 389, 398].) In the context of the instant case, the issue is whether McNeal said or did anything that would represent a show of authority, compelling a reasonable innocent person to submit to his request for identification. (*Florida v. Bostick, supra*, 501 U.S. at p. 436.) Circumstances indicative of a detention are the presence of several officers, weapon display, physical touching, and coercive language or tone of voice mandating compliance. (*In re Manuel G., supra,* 16 Cal.4th at p. 821; *U.S. v. Mendenhall* (1980) 446 U.S. 544, 554 [100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, 509].)

The totality of the circumstances reveals that McNeal did not seize Kelley by asking him for identification. A mere request, as opposed to a command dictating a person's conduct, does not constitute a Fourth Amendment restraint. Moreover, the request was unaccompanied by threats or physical force. Neither officer displayed a weapon, raised his voice, blocked Kelley's path, physically touched him, or told him to answer questions, to hand over his wallet or to remain at the gas station. Additionally, McNeal, alone, asked Kelley for identification; Ray was conducting a search of the pickup truck. Kelley's decision to cooperate by producing his wallet appears to have been entirely consensual. In short, nothing in the form or content of the request, or in the

officers' behavior imparted any compulsion to comply. There was no basis for finding Kelley was under the kind of restraint associated with a Fourth Amendment detention.

We recognize that most citizens typically feel nervous when officers approach and ask potentially incriminating questions. But that alone does not create a seizure based on a "show of authority." (See *U.S. v. Ayon-Meza* (9th Cir. 1999) 177 F.3d 1130, 1133. "[W]e must recognize that there is an element of psychological inducement when a representative of the police . . . initiates a conversation. But it is not the kind of psychological pressure that leads, without more, to an involuntary stop. [Citation.] It is even further from an arrest".) Indeed, the individual citizen's subjective belief and the officer's uncommunicated state of mind are irrelevant to whether a seizure has occurred. (*In re Manuel G., supra,* 16 Cal.4th at p. 821.) We cannot identify any "show of authority" in McNeal's simple request for identification, much less a show of authority that would cause an objectively reasonable innocent individual to feel compelled to submit to the officer's request.

Our determination Kelley was not detained by virtue of the request for identification does not complete our inquiry. It remains for us to consider whether Kelley's subsequent consent to the search of his wallet was voluntary. This is a related issue and also a question of fact to be determined from the totality of the circumstances. Relevant factors include whether the consenting individual was in custody, given *Miranda* warnings (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]), or was informed a search warrant could be obtained; and whether the officer indicated consent could be denied, obtained consent through deceit, displayed a weapon or was accompanied by other officers. (See *People v. Ledesma* (1987) 43 Cal.3d 171, 233-234; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226-227 [93 S.Ct. 2041, 2047, 36 L.Ed.2d 854, 862.)

When asked for permission to search his wallet, Kelley answered, "go ahead" and gave his wallet to McNeal. Kelley now claims his consent was a mere "submission to an express or implied assertion of authority" and thus involuntary. Here too, nothing in the record suggests Kelley's free will was overborne by McNeal or Ray. Kelley was not

detained or in custody when McNeal, alone, asked for consent; Ray was still involved in the pickup truck search. Neither officer displayed his weapon or otherwise coerced Kelley to consent to the search by words or actions. Nor is there evidence his consent was gained through by deceptive methods. It appears Kelley voluntarily consented to the search of his wallet, as he had minutes before consented to the search of his person and his vehicle during the consensual encounter. In sum, the motion to suppress evidence should have been denied.

DISPOSITION

The orders granting the Penal Code section 1538.5 motion and dismissing the action are reversed.

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ZELON, J.

We concur:

PERLUSS, P.J. JOHNSON, J.